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10/068,924	02/08/2002	Rebecca E. Whitmore	2390 (FJ-01-33)	9796

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EXAMINER

AUGHENBAUGH, WALTER

ART UNIT	PAPER NUMBER
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1772

DATE MAILED: 11/18/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Applicati n No.

10/068,924

Applicant(s)

WHITMORE ET AL

Examiner

Walter B Aughenbaugh

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 21 August 2003.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1,3-53 and 55-83 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3-53 and 55-83 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. §§ 119 and 120**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 13) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.  
a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_ 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Acknowledgement of Applicant's Amendments***

1. Applicant's amendments to Figures 5 and 7 made in the appendix to the Amendment filed August 21, 2003 (Paper 9) have been received and considered by Examiner.
2. Applicant's amendments to the specification made in Paper 9 have been received and considered by Examiner.
3. Applicant's amendments to claims 1, 3, 5, 7, 16, 19, 53, 55, 56 and 60 made in Paper 9 have been received and considered by Examiner.
4. Applicant's cancellation of claims 2 and 54 in Paper 9 has been acknowledged by Examiner.

### ***WITHDRAWN REJECTIONS***

5. The 35 U.S.C. 112 rejection of claims 1, 5, 7, 11, 16, 19, 56 and 60 previously made of record in paragraph 2 of Paper 7 has been withdrawn due to Applicant's amendments in Paper 9.
6. The 35 U.S.C. 103 rejection of claim 2 over Littlejohn et al. in view of Schlaupitz et al. made of record in paragraph 4 of Paper 7 has been withdrawn due to Applicant's cancellation of claim 2 in Paper 9.
7. The 35 U.S.C. 103 rejection of claims 53, 55-69, 74-76 and 78-83 over Littlejohn et al. in view of Schlaupitz et al. and in further view of Grusin made of record in paragraph 6 of Paper 7 has been withdrawn due to Applicant's amendments to claim 53 in Paper 9.
8. The 35 U.S.C. 103 rejection of claim 54 over Littlejohn et al. in view of Schlaupitz et al. and in further view of Grusin made of record in paragraph 6 of Paper 7 has been withdrawn due to Applicant's cancellation of claim 54 in Paper 9.

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9. The 35 U.S.C. 103 rejection of claims 70 and 71 made of record in paragraph 10 of Paper 7 has been withdrawn due to Applicant's amendments to claim 53 in Paper 9.

10. The 35 U.S.C. 103 rejection of claims 72 and 73 made of record in paragraph 11 of Paper 7 has been withdrawn due to Applicant's amendments to claim 53 in Paper 9.

11. The 35 U.S.C. 103 rejection of claim 77 made of record in paragraph 12 of Paper 7 has been withdrawn due to Applicant's amendments to claim 53 in Paper 9.

### ***REPEATED REJECTIONS***

#### ***Claim Rejections - 35 USC § 112***

12. The 35 U.S.C. 112 rejection of claim 6 has been repeated for the reasons previously made of record in paragraph 2 of Paper 7.

13. The 35 U.S.C. 112 rejection of claim 53 has been repeated for the reasons previously made of record in paragraph 2 of Paper 7 in regard to the term "generally"; "generally" appears in the first and sixth lines of section (b) of the claim. The bases for rejection of claim 53 under 35 U.S.C. 112 discussed in the first and second full paragraphs of page 3 of Paper 7 have been withdrawn due to Applicant's amendments in Paper 9.

#### ***Claim Rejections - 35 USC § 103***

14. The 35 U.S.C. 103 rejection of claims 1, 3-10, 13-18, 21-27, 33, 36-38, 43-45 and 47-52 over Littlejohn et al. in view of Schlaupitz et al. made of record in paragraph 4 of Paper 7 has been repeated for the reasons previously made of record in paragraph 4 of Paper 7 and for the following reasons that address the amendments to claims 1, 3, 5, 7 and 16:

In regard to claim 1, the base serving member taught by Littlejohn et al. has a substantially planar base central portion that is shown in Fig. 1. The base sidewall of Littlejohn et

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al. defines a sealing recess (item 52 shown in Fig. 7-10) disposed between the substantially planar base central portion of the base serving member and the base outer flange portion where the recess is provided with an inwardly projecting base stop ridge (the combination of items 54 and 56 shown in Fig. 7-10) adjacent an upper extremity of the recess. While Littlejohn et al. fail to teach a laterally extending, internal retaining shelf adjacent a lower extremity of the recess, Schlaupitz et al. teach a container having a base that has a laterally extending, internal retaining shelf (laterally extending section, item 82, Figures 4 and 5) that a corresponding section of the lid is positioned over (col. 7, lines 12-39). Schlaupitz et al. teach that the laterally extending, internal retaining shelf contributes towards effective locking of the container (col. 7, lines 34-39). Therefore, one of ordinary skill in the art would have recognized to have formed the base serving member taught by Littlejohn et al. such that the base serving member has a laterally extending, internal retaining shelf that corresponds to the horizontal lid reinforcing ring (item 26) taught by Littlejohn et al. adjacent a lower extremity of the recess in order to achieve effective mechanical support of the lid by the base serving member and to consequently achieve effective locking of the container as taught by Schlaupitz et al.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have formed the base serving member taught by Littlejohn et al. such that the base serving member has a laterally extending, internal retaining shelf that corresponds to the horizontal lid reinforcing ring (item 26) taught by Littlejohn et al. adjacent a lower extremity of the recess in order to achieve effective mechanical support of the lid by the base serving member and to consequently achieve effective locking of the container as taught by Schlaupitz et al.

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In further regard to claim 1, item 52 shown in Fig. 7-10 is an inwardly facing annular sealing surface at an outer wall of the sealing recess that is between the base stop ridge and the shelf of the container taught by Littlejohn et al. and Schlaupitz et al.

In further regard to claim 1, as previously discussed in regard to claim 2 in Paper 7, Littlejohn et al. and Schlaupitz et al. teach the sealable food container as discussed above, but fail to teach that the laterally extending retaining shelf extends outwardly over a base sidewall shelf width of at least about 0.5% of the characteristic of the diameter of the base serving member. The exact percentage of the diameter of the base serving member that the laterally extending retaining shelf extends outwardly over a base sidewall shelf is deemed to be a cause effective variable with regard to the sealing and mechanical properties of the container. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have determined the optimum value of a cause effective variable such as the percentage of the diameter of the base serving member that the laterally extending retaining shelf extends outwardly over a base sidewall shelf through routine experimentation in the absence of a showing of criticality in the percentage of the diameter of the base serving member that the laterally extending retaining shelf extends outwardly over a base sidewall shelf. *In re Boesch*, 205 USPQ 215 (CCPA 1980), *In re Woodruff*, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990).

The amendment to claim 3 was made due to the cancellation of claim 2 and to the incorporation of the subject matter of claim 2 into claim 1 and does not affect the rejection of claim 3 as previously made of record. In regard to claims 5 and 7, the lid shelf taught by Littlejohn et al. and Schlaupitz et al. is configured to cooperate with the retaining shelf of the base serving member to position the sealing lid with respect thereto. In regard to claim 16, the

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dome portion of the sealing lid of Littlejohn et al. has a substantially planar dome upper surface portion as shown in Fig. 1.

15. The 35 U.S.C. 103 rejection of claims 11 and 12 over Littlejohn et al. in view of Schlaupitz et al. and in further view of Yun made of record in paragraph 5 of Paper 7 has been repeated for the reasons previously made of record in paragraph 5 of Paper 7 and for the reasons that address the amendments to claims 1, 3, 5, 7 and 16 provided above.

16. The 35 U.S.C. 103 rejection of claims 19, 20, 28-32, 34 and 35 over Littlejohn et al. in view of Schlaupitz et al. and in further view of Grusin made of record in paragraph 6 of Paper 7 has been repeated for the reasons previously made of record in paragraph 6 of Paper 7, for the reasons that address the amendments to claims 1, 3, 5, 7 and 16 provided above where appropriate and for the following reasons that address the amendments to claim 19:

In regard to claim 19, Schlaupitz et al. teach a retaining ridge upper profile which is inwardly convex toward the center of the dome as shown in Figures 1 and 2 (note, especially, the reinforcing ribs integrally formed in both the side and top of the lid as clearly shown in Figure 1). Since the convex flutes of Schlaupitz et al. that project upwardly with respect to the generally planar dome upper surface portion of the dome to define a retaining ridge upper profile are arcuate (again, see Fig. 1 and 2) and since Grusin disclose that the lid (closure, item 11) includes upward projections (items 39a and 39b, Figures 1 and 5, col. 3, lines 42-44) that are complementary to the beveled surfaces of the sidewall recesses (items 24a and 24b) such that a stable stacking of containers is achieved via the complementary engagement of the upward projections (items 39a and 39b) and the sidewall recesses (items 24a and 24b) (col. 3, line 61-col. 4, line 5) as previously made of record in paragraph 6 of Paper 7, one of ordinary skill in the

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art would have recognized to have formed arcuate recesses in the sidewall of the base of the container taught by Littlejohn et al. and Schlaupitz et al. such that the arcuate recesses are complementary to the upwardly projecting, arcuate flutes (equivalently, such that the arcuate recesses are “configured and dimensioned to engage [the] inwardly convex retaining ridge profile” as claimed) in order to provide containers that can be stably stacked due to the complementary engagement of the upward projections and the sidewall recesses (and therefore configured and dimensioned recesses as claimed) as taught by Grusin.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have formed arcuate recesses in the sidewall of the base of the container taught by Littlejohn et al. and Schlaupitz et al. such that the arcuate recesses are complementary to the upwardly projecting, arcuate flutes (equivalently, such that the arcuate recesses are “configured and dimensioned to engage [the] inwardly convex retaining ridge profile” as claimed) in order to provide containers that can be stably stacked due to the complementary engagement of the upward projections and the sidewall recesses (and therefore configured and dimensioned recesses as claimed) as taught by Grusin.

17. The 35 U.S.C. 103 rejection of claims 39 and 40 over Littlejohn et al. in view of Schlaupitz et al. and in further view of Tsubone et al. made of record in paragraph 7 of Paper 7 has been repeated for the reasons previously made of record in paragraph 7 of Paper 7 and for the reasons that address the amendments to claim 1 provided above.

18. The 35 U.S.C. 103 rejection of claims 41 and 42 over Littlejohn et al. (860) in view of Schlaupitz et al. and in further view of Littlejohn et al. (509) made of record in paragraph 8 of



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Paper 7 has been repeated for the reasons previously made of record in paragraph 8 of Paper 7 and for the reasons that address the amendments to claim 1 provided above.

19. The 35 U.S.C. 103 rejection of claim 46 over Littlejohn et al. in view of Schlaupitz et al. and in further view of Lu made of record in paragraph 9 of Paper 7 has been repeated for the reasons previously made of record in paragraph 9 of Paper 7 and for the reasons that address the amendments to claim 1 provided above.

### ***NEW REJECTIONS***

#### ***Claim Rejections - 35 USC § 112***

20. Claims 11, 55 and 56 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 11 recites the limitation "said undercut annular base sealing surface" in the first-second lines of the claim. There is insufficient antecedent basis for this limitation in the claim. Claims 55 and 56 depend upon claim 54 which was cancelled in Paper 9 and therefore lack antecedent basis.

#### ***Claim Rejections - 35 USC § 103***

21. Claims 53, 55-69, 74-76 and 78-83 are rejected under 35 U.S.C. 103(a) as being unpatentable over Littlejohn et al. in view of Schlaupitz et al., and in further view of Yun, and in further view of Grusin.

Littlejohn et al. and Schlaupitz et al. teach the sealable food container as discussed above and in paragraph 4 of Paper 7.

In regard to claim 53, Schlaupitz et al. further teaches that the convex flutes project upwardly with respect to the generally planar dome upper surface portion of the dome to define a

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retaining ridge upper profile which is inwardly and upwardly convex toward the enter of the dome as shown in Figures 1 and 2 (note, especially, the reinforcing ribs integrally formed in both the side and top of the lid as clearly shown in Figure 1). Schlaupitz et al. also teaches that the containers are stacked on top of each other (col. 2, lines 27-30, col. 3, lines 11-12 and col. 6, lines 43-46).

Littlejohn et al. and Schlaupitz et al. fail to teach that the base sealing portion of the sidewall is outwardly and upwardly disposed with respect to the substantially planar base central portion and fail to teach that the base serving member includes an inwardly convex annular sidewall stacking recess at a lower portion of the base sidewall that is configured to engage the inwardly and upwardly convex retaining ridge profile in order to render a plurality of the food containers securely stackable with one another.

In regard to the claimed outwardly and upwardly disposed base sealing portion, Yun, however, discloses a container with container base 6 and lid 8 (col. 2, lines 6-7 and Figure 1) forming an integral seal 20 (col. 2, lines 20-22 and Figure 1). The integral seal surface of both container base 6 and lid 8 of Yun extend upwardly and outwardly with respect to the planar central portion of the base and the downwardly extending sidewall of the sealing lid, respectively. It would have therefore been obvious to one of ordinary skill in the art at the time the invention was made to have modified the sealing surfaces of the base and lid of Littlejohn et al. such that the sealing surfaces extend upwardly and outwardly with respect to the planar central portion of the base and the downwardly extending sidewall of the sealing lid, respectively, since this structure is notoriously well known as a suitable structure for the cooperative sealing surfaces of container bases and lids, as taught by Yun.

In regard to the claimed structure of the inwardly convex annular sidewall stacking recess, Grusin discloses a stackable food container having beveled sidewall end panels (items 24a and 24b, Figures 3 and 5) which are beveled upwardly (col. 3, lines 5-15) and which are functionally equivalent to the claimed mating annular sidewall recess at a lower portion of the base sidewall. Grusin disclose that the lid (closure, item 11) includes upward projections (items 39a and 39b, Figures 1 and 5, col. 3, lines 42-44) that are complementary to the beveled surfaces of the sidewall recesses (items 24a and 24b) such that a stable stacking of containers is achieved via the complementary engagement of the upward projections (items 39a and 39b) and the sidewall recesses (items 24a and 24b) (col. 3, line 61-col. 4, line 5). Since Grusin disclose that the lid (closure, item 11) includes upward projections (items 39a and 39b, Figures 1 and 5, col. 3, lines 42-44) that are complementary to the beveled surfaces of the sidewall recesses (items 24a and 24b) such that a stable stacking of containers is achieved via the complementary engagement of the upward projections (items 39a and 39b) and the sidewall recesses (items 24a and 24b) (col. 3, line 61-col. 4, line 5) as previously made of record in paragraph 6 of Paper 7, one of ordinary skill in the art would have recognized to have formed recesses in the sidewall of the base of the container taught by Littlejohn et al. and Schlaupitz et al. such that the recesses are complementary to the upwardly projecting, flutes (equivalently, such that the recesses are 'configured to engage [the] inwardly and upwardly convex retaining ridge profile' as claimed) in order to provide containers that can be stably stacked due to the complementary engagement of the upward projections and the sidewall recesses as taught by Grusin.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the sealing surfaces of the base and lid of Littlejohn et al. such that

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the sealing surfaces extend upwardly and outwardly with respect to the planar central portion of the base and the downwardly extending sidewall of the sealing lid, respectively, since this structure is notoriously well known as a suitable structure for the cooperative sealing surfaces of container bases and lids, as taught by Yun, and to have formed recesses in the sidewall of the base of the container taught by Littlejohn et al. and Schlaupitz et al. such that the recesses are complementary to the upwardly projecting, flutes (equivalently, such that the recesses are "configured to engage [the] inwardly and upwardly convex retaining ridge profile" as claimed) in order to provide containers that can be stably stacked due to the complementary engagement of the upward projections and the sidewall recesses as taught by Grusin.

Claim 55 lacks antecedent basis as the claim upon which claim 55 depends, claim 54, was cancelled in Paper 9. Claim 56 lacks antecedent basis as the claim upon which claim 56 depends, claim 55, depends upon claim 54, which was cancelled in Paper 9.

In regard to claims 57-69, 74-76 and 78-83, the 35 U.S.C. 103 rejection of claims 57-69, 74-76 and 78-83 made of record in paragraph 6 of Paper 7 has been repeated for the reasons previously made of record taking into account the new rejection of claim 53 provided above in this Office Action that was necessitated due to Applicant's amendments to claim 53 in Paper 9.

The sole amendment to claim 60 addresses the 35 U.S.C. 112 rejection of claim 60 made of record in Paper 7 and does not affect the 35 U.S.C. 103 rejection of claim 60 made of record in paragraph 6 of Paper 7.

22. Claims 70 and 71 are rejected under 35 U.S.C. 103(a) as being unpatentable over Littlejohn et al. in view of Schlaupitz et al., and in further view of Yun, and in further view of Grusin, and in further view of Tsubone et al.

Littlejohn et al., Schlaupitz et al., Yun and Grusin teach the sealable food container as discussed above. In regard to claim 70, Littlejohn et al., Schlaupitz et al., Yun and Grusin fail to teach that the base serving member is thermoformed from a mineral-filled polypropylene sheet. Tsubone et al., however, disclose a polypropylene sheet (col. 2, lines 45-50) that contains an inorganic filler in order to endow the sheet with formability to shape (col. 3, lines 9-14). Furthermore, Tsubone et al. teach that addition of the inorganic filler brings about improvements in heat resistance and stiffness (col. 3, lines 20-22). Therefore, one of ordinary skill in the art would have recognized to use the mineral filled polypropylene sheet as the base of Littlejohn et al., Schlaupitz et al., Yun and Grusin, since it is notoriously well known that mineral (inorganic) fillers improve the thermoformability of thermoplastic sheets and the mechanical properties of articles thermoformed from thermoplastic sheets as taught by Tsubone et al.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have used the mineral filled polypropylene sheet as the base of Littlejohn et al., Schlaupitz et al., Yun and Grusin, since it is notoriously well known that mineral (inorganic) fillers improve the thermoformability of thermoplastic sheets and the mechanical properties of articles thermoformed from thermoplastic sheets as taught by Tsubone et al.

In regard to claim 71, Littlejohn et al., Schlaupitz et al., Yun and Grusin fail to teach the inclusion of a mineral filler, or titanium dioxide or a basic organic or inorganic compound comprising the reaction product of an alkali metal or alkaline earth element with carbonates, and as further recited in lines 8-11 of claim 23. Tsubone et al., however, disclose the use of an inorganic filler such as talc, titanium dioxide, clay, calcium carbonate, silica, alumina, glass powders, etc. (col. 3, lines 22-30) in a mixture of polypropylene and polyethylene (col. 2, lines

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48-50). Examiner interprets the terms "mineral" and "inorganic" to be equivalent. Tsubone et al. disclose that the inorganic fillers can be used in combination of two or more thereof (col. 3, lines 27-29). Therefore, one of ordinary skill in the art would have recognized to have added a mineral filler, titanium dioxide and calcium carbonate to the base material of Littlejohn et al. Schlaupitz et al., Yun and Grusin in order to improve the thermoformability of thermoplastic sheets and the mechanical properties of articles thermoformed from thermoplastic sheets as taught by Tsubone et al.

23. Claims 72 and 73 are rejected under 35 U.S.C. 103(a) as being unpatentable over Littlejohn et al. (860) in view of Schlaupitz et al., and in further view of Yun, and in further view of Grusin, and in further view of Littlejohn et al. (509).

Littlejohn et al., Schlaupitz et al., Yun and Grusin teach the sealable food container as discussed above. Littlejohn et al., Schlaupitz et al., Yun and Grusin fail to teach that the wall caliper of the base is about 10 to about 50 mils (as claimed in claim 72) or about 12 to about 25 mils (as claimed in claim 73). Littlejohn et al. (509), however, disclose a plate having a wall caliper of about 10 to about 50 mils, preferably of about 15 to about 25 mils (col. 4, lines 2-9). Therefore, one of ordinary skill in the art would have recognized to have formed the base of the container of Littlejohn et al. (860), Schlaupitz et al., Yun and Grusin with a wall caliper of about 10 to about 50 mils, preferably of about 15 to about 25 mils, since these wall caliper values are notoriously well known as suitable wall caliper values for a food container as taught by Littlejohn et al. (509).

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24. Claim 77 is rejected under 35 U.S.C. 103(a) as being unpatentable over Littlejohn et al. in view of Schlaupitz et al., and in further view of Yun, and in further view of Grusin, and in further view of Lu.

Littlejohn et al., Schlaupitz et al., Yun and Grusin teach the sealable food container as discussed above. Littlejohn et al., Schlaupitz et al., Yun and Grusin fail to teach that the styrene polymer comprises a styrene-butadiene copolymer. Lu, however, discloses that styrene-butadiene serves as an impact resistant polymer for container (col. 4, lines 3-6) and that polybutadiene is the preferred rubber component of the impact polymer (col. 2, lines 47-62). Therefore, one of ordinary skill in the art would have recognized to have added a styrene-butadiene copolymer to the container of Littlejohn et al., Schlaupitz et al., Yun and Grusin to improve the impact resistance of the container as taught by Lu.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have added a styrene-butadiene copolymer to the container of Littlejohn et al., Schlaupitz et al., Yun and Grusin to improve the impact resistance of the container as taught by Lu.

#### ***ANSWERS TO APPLICANT'S ARGUMENTS***

25. Applicant states that US 6,440,509 "is not believed prior art" on the second page under the **REMARKS** heading in Paper 9; in response, MPEP 706.02(l)(1) states:

Effective November 29, 1999, subject matter which was prior art under former 35 U.S.C. 103 via 35 U.S.C. 102(e) is now disqualified as prior art against the claimed invention if that subject matter and the claimed invention "were, at the time the invention was made, owned by the same person or subject to an obligation of assignment to the same person."

The subject matter of US 6,440,509 cited in the Office Action (Paper 7) that was "owned by the same person or subject to an obligation of assignment to the same person" is not the same as the

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subject matter claimed in claims 41, 42, 72 and 73 of the instant application. US 6,440,509 limits the wall caliper ranges of about 10 to about 50 mils and of about 15 to about 25 mils to plates; while the instant claims are not limited to plates. While not necessary to establish that the subject matter claimed in claims 41, 42, 72 and 73 of the instant application is not the subject matter of US 6,440,509 cited in the Office Action (Paper 7), the claimed range of 12 to 25 mils (claims 42 and 73), i.e. the lower limit of 12 mils, is not taught by US 6,440,509. For the above reasons, US 6,440,509 constitutes prior art for the instant application.

26. Applicant argues that the “art does not suggest a container with a sealing recess and an internal retaining shelf of significant length as claimed in claim 1” on the second page under the “**REMARKS**” heading in Paper 9, but a sealing recess is defined by item 52 of Littlejohn et al. (‘860) as made of record in the 35 U.S.C. 103(a) rejection of claim 1 in this Office Action (Paper 10), and item 82 of Schlaupitz et al. is indeed “an internal retaining shelf of significant length” (see Fig. 4 and 5). A “sidewall base sealing portion and an inwardly convex annular sidewall stacking recess” are also taught from the proposed combination of references.

Applicant argues that the “neither [Littlejohn et al. (‘860) nor Schlaupitz et al.] discloses an internal retaining shelf” on the fourth page under the “**REMARKS**” heading in Paper 9, but Schlaupitz et al. does disclose an internal retaining shelf as discussed above. The alleged advantages of the container of the instant application that Applicant mentions on the top of the fifth page under the “**REMARKS**” heading in Paper 9 do not supercede the fact that the claimed structure is taught by the Office’s proposed combination of references.

Applicant argues that the Schlaupitz et al. “has... no internal shelf” on the fifth page under the “**REMARKS**” heading in Paper 9, but Schlaupitz et al. does disclose an internal shelf as



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discussed above. The sealing surface of Littlejohn et al. (860) is an "inward facing sealing surface". Applicant argues that the "laterally extending section 82 is clearly external to the sidewall", but the claim language does not require that the term "internal" is used with the sidewall as the point of reference which is used to determine what is external and what is internal; section 82 is certainly in the interior of the container of Schlaupitz et al. (Fig. 4 and 5). The limitations on which the Applicant relies (i.e. interior relative to the sidewall) are not stated in the claims. It is the claims that define the claimed invention, and it is the claims, not specifications that are anticipated or unpatentable. *Constant v. Advanced Micro-Devices Inc.*, 7 USPQ2d 1064.

27. In response to Applicant's piecemeal analysis of the Grusin reference in the second full paragraph of the fifth page under the "REMARKS" heading in Paper 9, it has been held that one cannot show non-obviousness by attacking references individually where, as here, the rejections are based on combinations of references. *In re Keller*, 208 USPQ 871 (CCPA 1981). One of ordinary skill in the art would have recognized to have modified (configure as claimed) the shape of the stacking recesses of Grusin in order to accommodate the retaining ridge profile of Schlaupitz et al. for the reasons provided in the appropriate rejections made of record in this Office Action (Paper 10). It is not seen how the passage cited by Applicant (col. 3, lines 5-15 of Grusin) supports Applicant's assertion that "the bottom-beveled geometry [of Grusin] has the disadvantage that the container is rendered less stable". Furthermore, the alleged disadvantages of the structure taught by Grusin that Applicant mentions do not supercede the fact that the claimed structure is taught by the Office's proposed combination of references.

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*Conclusion*

28. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

29. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Walter B. Aughenbaugh whose telephone number is 703-305-4511. The examiner can normally be reached on Monday-Thursday from 9:00am to 6:00pm and on alternate Fridays from 9:00am to 5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon, can be reached on 703-308-4251. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9310.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

wba  
11/10/03 *WBA*

*[Signature]*  
HAROLD PYON  
SUPERVISORY PATENT EXAMINER  
*1772*

*11/14/03*